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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION,
*Petitioner,*

*vs.*

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,
*Respondent.*

T. H. BELL, SECRETARY OF EDUCATION,
*Petitioner,*

*vs.*

COMMONWEALTH OF PENNSYLVANIA,
*Respondent.*

## BRIEF FOR RESPONDENT STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

IRWIN I. KIMMELMAN
Attorney General of New Jersey
*Attorney for Respondent, State of New Jersey, Department of Education*
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8577

MICHAEL R. COLE
Assistant Attorney General

MARY ANN BURGESS
Assistant Attorney General
*Of Counsel and On the Brief*

JAYNEE LAVECCHIA
Deputy Attorney General

REGINA MURRAY MAHONEY
Deputy Attorney General
*On the Brief*

## Questions Presented

1. Whether the Secretary of Education has the authority to administratively order the State of New Jersey to repay moneys received by it under Title I grants when such federal grants were awarded in 1970 and 1971 before the enactment of the 1978 Amendments to the Elementary and Secondary Education Act of 1965.

2. If the sanction of repayment of Title I moneys, included for the first time in the 1978 Amendments, is retroactively applied to an audit of Title I funds expended in the Newark school district for the 1970-71 and 1971-72 school years, whether the substantive challenges to the correctness of this federal audit, raised below but not reached by the Third Circuit, should be remanded for adjudication by the Third Circuit. Further, whether on remand, the Third Circuit should consider those aspects of the 1978 Amendments which are favorable to New Jersey, not simply the pay back provisions which redound to the favor of the Department.

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## BRIEF FOR RESPONDENT STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

## Statement of the Case

This case concerns the propriety of an administrative order directing the State of New Jersey, Department of Education, to refund to the United States Department of Education $1,031,304 in Title I moneys expended by the Board of Education of the City of Newark during the 1970-71 and 1971-72 school years.[1] This order, issued on May 7, 1980, resulted from an audit of the Newark Title I program which concluded that certain school attendance areas within the City had been improperly classified as eligible for receipt of Title I funding.

Title I of the Elementary and Secondary Education Act of 1965 was intended to provide financial assistance in "areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U.S.C. § 241a. Although this legislation has been subject to frequent amendment, its basic objective has remained constant.[2] Thus, under Title

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[1] The United States Court of Appeals for the Third Circuit, in the opinion before this Court, reversed final decisions stemming from unrelated administrative proceedings involving the State of New Jersey and the Commonwealth of Pennsylvania. The facts set forth in this brief relate solely to the New Jersey Title I program and administrative proceeding.

[2] Pub. L. No. 89-10, 79 Stat. 27, *amended by* Pub. L. No. 89-750, 80 Stat. 1191 (1966); Pub. L. No. 90-247, 81 Stat. 783 (1967); Pub. L. No. 91-230, 84 Stat. 121 (1969, *enacted* 1970); Pub. L. No. 92-318, 86 Stat. 235 (1972); Pub. L. No. 93-380, 88 Stat. 484 (1974); Pub. L. No. 94-482, 90 Stat. 2081 (1976); Pub. L. No. 95-112, 91 Stat. 911 (1977); Pub. L. No. 95-561, 92 Stat. 2143 (1978); *and* Pub. L. No. 96-46, 93 Stat. 338 (1979). Currently, Title I funds are authorized as part of the Omnibus Budget Reconciliation Act of 1981. See Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95

*(Footnote continued on following page)*

I, substantial amounts of federal aid have been directed to local school districts experiencing difficulties in funding adequate programs due to concentrations of low-income families. H. R. Rep. No. 1137, 95th Cong., 2d Sess. 1, 2, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 4971, 4972. Recognizing that Title I would be more effective if State and local officials had adequate notice of the level of Title I funds available, Congress designated Title I as an advance funding program. See Pub. L. No. 93-380, 88 Stat. 484 (enacted 1974, codified at 20 U.S.C. § 1223 (1976 Supp.)).

This legislation places essential responsibility for designing and implementing Title I educational programs with those local educational agencies, most typically public school districts, which have concentrations of disadvantaged children within their attendance areas. 20 U.S.C. § 244(6)(B). This commitment of educational decision-making to local officials reflected the Congressional aversion to the "federalization" of education.

> It is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts. Rather, such matters are left to the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from State to State and district to district. [H.R. Rep. No. 143, 89th Cong., 1st Sess. 5 (1965); S. Rep. No. 146, 89th Cong., 1st Sess. 9 (1965)].

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*(Footnote continued from preceding page)*

Stat. 463 (codified at 20 U.S.C. § 3801 et seq. (1982 Supp.)). References to the various pieces of amending legislation will be by the date contained in their short titles - - - - *e.g.* 1978 Admendments.

Consistent with this demarcation of responsibilities, the local educational agency develops an educational program to meet the unique needs of economically and educationally deprived children within its attendance areas and submits the proposal to the State educational agency for approval. If acceptable, the State will approve the proposal and submit it to the United States Department of Education supported by its assurances that the State and local agencies will comply with the provisions of Title I.[3] It is the United States Department of Education which has the ultimate responsibility for administering the Title I program and dispensing the funds appropriated thereunder.

Consistent with this structure, the Board of Education of the City of Newark, the local educational agency involved in the New Jersey administrative proceeding, submitted a Title I proposal to the New Jersey Department of Education for each of the three fiscal years covered by the present federal audit: 1970-71, 1971-72 and 1972-73. These proposals were approved by the State of New Jersey and submitted together with the State's assurances to the appropriate federal officials.

The Newark Title I application for the 1971-72 fiscal year, which was the primary focus of the federal audit, showed that 33.9% of the children in the Newark school district were from low-income families (J.A. 20).[4] The

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[3] The Department of Education, created by the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§ 3401-3508 (Supp. III 1979)), is the successor to the Office of Education in the Department of Health, Education and Welfare.

[4] As used herein, "J.A." refers to the Joint Appendix; "Pet. App." to the Appendix to the Petition for Writ of Certiorari; "Pet. C." to the Petition for Writ of Certiorari; "Pet. B." to the Petitioner's brief on the merits; and "R.N.J. App." to the Appendix to Respondent New Jersey's brief.

statistics further demonstrated that in some areas of the City the incidence of children from low-income families was as high as 80%. The Newark application showed that 53 of the 67 schools in the City had low-income percentages higher than the district-wide average of 33.9% while only 6 schools had less than 20% low-income students. The narrative portion of the 1971-72 application also demonstrated that Newark was uniformly disadvantaged in other ways. The City was then, as it still is today, in a more advanced state of urban decay than any other in the country. Statistics showed a jobless rate in 1970 of 14%, a rate double that needed to qualify, at that time, under the Economic Development Act. Another 35,000 residents were earning $3,000 per year or less. In 1971, the Model Cities program in Newark was expanded to include the entire city. At the time the 1971-1972 proposal was submitted, Newark had a black population of 54.2% with another 11% of its population of Hispanic background. The City also had the highest percentage of slum housing in the nation, the highest incidence of crime, and the second highest birthrate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics of Newark's low-income population, was the fact that in 1970-71, Newark had the highest population turnover in the nation. Indeed, Model Cities data indicate that mobility rates reached as high as 80% for schools in the Title I area (J.A. 176).

The Department of Health, Education and Welfare Audit Agency conducted an audit of the Title I program, designed and implemented by the Board of Education of the City of Newark, for the period from September 1, 1970 to August 31, 1973. During that three year period, of the $156,166,574 in Title I funds allotted to the State of New Jersey, $28,709,198 was sub-allotted to the City of

Newark.[5] The principal objective of the audit was to determine the "propriety and efficacy" of the method employed by Newark to select eligible school attendance areas (J.A. 14). At that time, the statutory eligibility standard simply provided that Title I funds should be used for projects designed to meet the special educational needs of educationally deprived children in "school attendance areas having high concentrations of children from low-income families," 20 U.S.C. § 241c (a)(1). This broad standard was interpreted by § 116.17(d) of the Title I regulations then in place (45 C.F.R. § 116.17(d)) as including (1) attendance areas in which the number of children from low-income families was as large as, or larger than, the average number of such children in the various attendance areas of the school district, and (2) attendance areas in which the percentage of children from low-income families was as large as, or larger than, the per-

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[5] The Board of Education for the City of Newark had a student enrollment of 82,713 for the 1970-71 school year and a current expense budget of $91,803,514. Of that amount, $21,566,996 represented State aid, $9,631,019 Title I and $4,842,261 other federal aid. For 1971-72, the student enrollment was 82,894 and the current expense budget $102,818,745. Of that amount, $29,-069,240 was State aid, $9,899,446 Title I and $6,410,390 other federal aid. In 1972-73, the student enrollment was 81,801 and the current expense budget was $116,354,650. Of that amount, $38,-517,410 represented State aid, $9,379,648 Title I and $7,746,792 other federal aid. For the most recent school year, 1982-83, 58,729 students are enrolled in the Newark school district which has a current expense budget of $201,422,200. Of that amount $132,769,653 represents State aid, $10,795,535 Title I and $9,406,942 other federal aid. State of New Jersey, *Twentieth Annual Report of the Commissioner of Education;* State of New Jersey, *Twenty-First Annual Report of the Commissioner of Education;* State of New Jersey, *Twenty-Second Annual Report of the Commissioner of Education;* State of New Jersey,*Thirty-Second Annual Report of the Commissioner of Education.*

centage of such children in the school district. Section 116.17(d) also permitted an entire school district to be designated as eligible when there was no wide variance in the number or percentage of children from low-income families.

Because of the unavailability of complete AFDC statistical data showing the number of low-income children *eligible* to attend school in each specific area[6] and because of extremely high mobility of much of its school age population, Newark was unable to determine eligibility of school attendance zones for the 1971-72 school year in strict conformity with 45 C.F.R. § 116.17(d). However, as recognized by the auditors, it employed the reasonable alternative of measuring eligibility by the number of children from low-income families actually enrolled in public schools in the various attendance areas (J.A. 21).[7] The auditors, analyzing this alternative method, discovered that the Newark Board had erred in its application. In determining the

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[6] AFDC statistics were accepted by the then Office of Education as an acceptable data source for determining the number of children from low-income families. *ESEA Title I Program Guide # 44* (March 18, 1968).

[7] The AFDC statistics provided the Newark Board of Education by the Essex County Welfare Board only listed the number of AFDC children enrolled in each regular public elementary and secondary school. The Welfare Board did not report AFDC children attending private schools, schools for handicapped children or those AFDC children who were "drop-outs" from the educational system (J.A. 20). It was, therefore, impossible for Newark to determine the number or percentage of low-income children *eligible* to attend the public schools. Rather, Newark was forced to utilize statistics which simply showed the number of low-income children actually attending the public schools. It was a methodology which, by its very nature, resulted in an underreporting of low-income children.

Title I eligibility of its attendance areas, the Newark Board had used a ratio which included, in its numerator, AFDC children actually enrolled in public schools but which included, in its denominator, only the total enrollment of the elementary schools. The auditors found this formula unacceptable since there was no direct relationship between the component elements and replaced it with one which eliminated the AFDC children enrolled in the secondary schools. By applying their revised formula, the auditors determined that Newark had misclassified 13 schools as eligible for Title I funding in 1971-72.[8]

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[8] The following schools were found to be ineligible for Title I funding, in 1971-72, under the auditors' recalculation:

| School | Low-Income Percentage Shown by Newark on Application | Low-Income Percentage As computed by Auditors | Title I Expenditures |
|---|---|---|---|
| Madison | 60.6 | 28.8 | $ 103,750 |
| Newton Street | 54.9 | 31.5 | 69,463 |
| So. 17th Street | 53.1 | 33.5 | 104,842 |
| Central Avenue | 53.0 | 29.4 | 61,532 |
| Burnet Street | 50.6 | 30.2 | 56,007 |
| Waverly Avenue | 49.9 | 31.9 | 56,665 |
| Franklin | 46.5 | 32.4 | 115,227 |
| Marcus Garvey | 46.2 | 22.9 | 119,487 |
| Garfield | 34.7 | 20.6 | 81,976 |
| Hawkins | 34.7 | 30.3 | 102,803 |
| Clinton Jr. High | 69.5 | 32.1 | 58,214 |
| Weequahic High | 37.5 | 27.9 | 53,284 |
| East Side High | 35.0 | 13.0 | 46,380 |
| | | | $1,029,630 |

(J.A. 23 to J.A. 25).

In addition to this error, which occurred only in 1971-72, the auditors also determined $132,287 in Title I funds had been used during 1970-71 in schools which, in their opinion, did not meet the eligibility requirements of the Title I regulations. The auditors observed, however, that the deficient practices utilized by Newark to determine Title I eligibility were corrected by 1972-73, the third and final year covered by the audit. There were no audit exceptions for that year (J.A. 15). On the basis of their report, the auditors concluded that arrangements should be made for the State to return $1,161,917 to the Office of Education.

The initial audit report of the Newark Title I program was received by the New Jersey Department of Education on October 21, 1974 while the final report was dated June 20, 1975. This was followed by a Final Audit Determination Letter, dated June 11, 1976, in which the Deputy Commissioner for School Systems demanded that the New Jersey State Department of Education "refund $1,161,917 to the Office of Education". The State was further informed that it could either "submit payment" in that amount or appeal the final audit determination (J.A. 137 to J.A. 138). In a letter dated July 26, 1976, the State of New Jersey appealed that determination and, at the same time, questioned the authority of the Office of Education to seek the repayment of funds (J.A. 188 to J.A. 189).

In its Application for Review, dated October 21, 1976, the State of New Jersey advanced its substantive challenges to the Final Audit Determination. The State argued, at the outset, that the attendance areas declared ineligible by the federal auditors were, in fact, eligible for Title I assistance. In support of this position, the State submitted recalculations of Title I eligibility. These recalculations measured eligibility by comparing the total number of AFDC children from each attendance area enrolled in public elementary and secondary schools with the total number of

children from the area enrolled in public elementary and secondary schools (J.A. 226). The formula employed by the State responded to the auditors' criticism of the Newark methodology since the component elements were directly related. More importantly, unlike the federal recalculations, it did not remove AFDC children in secondary schools from the formula; rather, it simply added all children in public secondary schools to the comparison. The State's recalculations, therefore, more accurately reflected the number of low-income children attending public schools in the various attendance areas than did those of the federal auditors.[9] In the alternative, New Jersey

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[9] Following is a comparison of the recalculations of Title I eligibility performed by the HEWAA auditors and by New Jersey:

| | 1971 Low Income Percentage | |
|---|---|---|
| | Recalculations of HEWAA Auditors | Recalculations of New Jersey |
| Madison | 28.8 | 39.7 |
| Newton Street | 31.5 | 42.8 |
| So. 17th Street | 33.5 | 40.3 |
| Central Avenue | 29.5 | 41.4 |
| Burnet Street | 30.2 | 39.0 |
| Waverly Avenue | 31.9 | 37.2 |
| Franklin | 32.4 | 34.8 |
| M. Garvey | 22.9 | 36.1 |
| Garfield | 20.6 | 26.0 |
| Hawkins | 30.3 | 25.9 |

(Pet. App. 52a)

The State did not submit recalculations for the secondary schools since it was the State's position that, under the applicable rules, only elementary attendance areas had to qualify as eligible attendance areas (Pa371; Vol. II of Appendix submitted on behalf of Petitioner, State of New Jersey, in the Third Circuit).

argued that the whole of the Newark school district, which had a district-wide low-income percentage of 33.9%, qualified for designation as a Title I area under regulations applicable in 1971 and in accordance with the clearly expressed intent of Congress (J.A. 177 to J.A. 179). In its application, the State also expressed its confidence:

> . . . that it will prevail in this application, and therefore will not address the question of refunds at this time. However, it is aware of no authority for this refund procedure and reserves its right to challenge OE's authority to employ it at a later date. (J.A. 170).

That issue was specified among the legal contentions advanced by the State of New Jersey and incorporated in the Pre-Hearing Memorandum, dated March 31, 1978 (J.A. 223). It was also briefed and argued, together with its substantive arguments, by the State of New Jersey.

In its decision of February 19, 1980, the Education Appeal Board rejected the State's argument that the Commissioner was without statutory authority to order repayment of Title I funds observing, at the same time, that this issue was one which "may ultimately be raised and determined in an appropriate judicial forum" (Pet. App. 39a). The Board then went on to reject the substantive arguments advanced by New Jersey and demanded that the State repay $1,031,304 to the United States Department of Education. The only difference between this sum and the repayment demanded in 1976 was $130,613, an amount barred by operation of the applicable statute of limitations. 20 U.S.C. § 884 (1976) (Pet. App. 35a to 36a). By letter dated May 7, 1980, New Jersey was advised that the Panel's Decision was the final decision of the United States De-

partment of Education and again informed that it should refund $1,031,304 to the Department (Pet. App. 88a).

The State of New Jersey, Department of Education, filed a Petition for Review of the Secretary of Education's decision with the United States Court of Appeals for the Third Circuit, pursuant to 20 U.S.C. § 2851. In its Petition, New Jersey, in addition to arguments on the substantive validity of the audit, contended that the United States Department of Education was without statutory authorization to order the State to repay moneys received under Title I grants in the 1970 and 1971 school years. Rather, it was limited to withholding future payments to satisfy any sums found due on audit.

The Third Circuit issued an Opinion on October 13, 1981, in which it granted the Petitions for Review of both New Jersey and Pennsylvania, reversed the Orders of the Department of Education and remanded the cases with instructions "to vacate the orders requiring a repayment by petitioners of previously received Title I funds" (Pet. App. 25a). Since it was concluded that the Department did not have authority to issue these Orders, the Court did not reach the challenges advanced by New Jersey to the correctness of the audit findings or the challenges of Pennsylvania to the Department's interpretation of the Act's statute of limitations or to the sufficiency of its rulemaking proceedings (Pet. App. 3a).

The underpinning of the Third Circuit's decision was the "overarching principle" of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981) "that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant" (Pet. App. 14a). The Court below found that at the time the Title I grants were made to New Jersey and Pennsylvania, Congress had not statutorily authorized the Department of

Education to order the repayment of misspent or misapplied funds (Pet. App. 18a). Indeed, it was not until five years after the last of the disputed funds were received, that the 1978 Amendments to the Elementary and Secondary Education Act specifically authorized that sanction. Applying the *Pennhurst* rationale, the Third Circuit held that the Department of Education was limited to those statutory remedies, such as withholding funds or disapproving applications, which were clearly in effect when the Title I funds were received by New Jersey and Pennsylvania. However, Title I participants who have received funds after the effect of the 1978 Amendments, which authorized the Department to order the repayment of misspent or misapplied funds, have been clearly "advised by Congress" that such sanction may be utilized against them (Pet. App. 7a; Pet. App. 24a).

The Third Circuit also considered the federal government's argument that it had a common law right to recover misspent funds which right could be exercised within the context of an administrative proceeding. The Court below held that "if an agency employing an advance-funding scheme such as that provided for in Title I relies on a common law right to recover misspent funds, it may do so only by maintaining a civil action in a court of competent jurisdiction" (Pet. App. 25a). In a concurring opinion, however, Judge Higginbotham observed that since the Department had never endeavored to exercise its common law rights, that issue was not properly before the Court and the Court's discussion of those rights was *dictum* (Pet. App. 26a).

The Third Circuit, in an Order entered December 17, 1981, denied a Petition for Rehearing. On May 17, 1982, a Petition for Writ of Certiorari was filed on behalf of the Secretary of Education which Petition was granted by this Court on October 4, 1982.

## Summary of Argument

The power of Congress to regulate the States pursuant to the spending power is subject to the well recognized limitation that the terms and conditions which Congress seeks to impose upon the States pursuant to the "contract" must be clearly and unambiguously stated. This clear statement rule emanates from fundamental considerations of sovereignty. While a State may derogate its sovereignty by entering into a contract with the Federal Government, it must have the capability of doing so knowledgeably and voluntarily. In this appeal, the Department seeks to retroactively deny that right to New Jersey by imposing *ex post facto* conditions on the Title I agreements entered into by New Jersey and the Federal Government for the 1970-71 and 1971-72 school years.

During this period, there existed in Title I only one statutory sanction in the event a State was determined to be in substantial noncompliance with the program's requirements. That sanction was the prospective withholding of Title I funds. In asking this Court to retroactively modify that agreement, in a way more beneficial to it and in light of subsequent enactments, the Department seeks to contravene the established body of law governing federal-state relations in the context of grants-in-aid.

The Department's brief avoids the basic considerations of federalism at issue in this case. Rather, it relies upon oblique references to the Federal Government's right to recoup. Reference to a power to recoup is not helpful, however, because the term lacks precision. The question presented here is the method of recovery. New Jersey recognizes the Department's ability to offset to recover amounts legitimately owed to it under Title I. To the extent the Department is willing to use an offset mechanism, there is

no controversy between the parties except, of course, the substantive issue of what, if anything, is owed, which issue the Third Circuit, in light of its holding, never addressed.

The basic point is that the right to demand repayment was not expressly made a condition of the agreement entered into between the Federal Government and New Jersey. Such a right may not be read into the agreement under a theory that it was implied by Congress. Terms and conditions cannot be implied in an agreement between the Federal Government and a sovereign State in the context of a grant-in-aid statutory scheme enacted by Congress pursuant to the Spending Clause. The terms and conditions must be clearly and unambiguously stated. Congress must confront and resolve the competing interests involved in federal-state relations in the context of grants-in-aid and should not be permitted to benefit from subsequent unilateral alterations of the basic terms of commitment between the two. The clear statement rule is thus an essential complement to the political check on Congressional power. The approach to statutory construction of a grant-in-aid ought to reinforce the protections inherent in pluralism and federalism.

Since the State of New Jersey has not voluntarily and knowingly agreed to a contract with the Federal Government which includes the sanction of repayment for noncompliance, the Department's efforts to enforce that sanction run counter to the dictates of the Tenth Amendment. The Department's order that New Jersey repay $1,031,304 in Title I funds, not only represents a mandate that the State appropriate funds for a specific purpose but constitutes a significant intrusion into the area of education—an area recognized to be one of unique State and local concern and control. The inappropriateness of the Department's attempt to demand repayment is highlighted by the fact that

a less intrusive method of recovering the disputed funds is available and was agreed to by New Jersey when it agreed to participate in the Title I program in 1970-71 and 1971-72. That method is offset.

Finally, the Department's argument that the 1978 Amendments, which for the first time authorized the sanction of repayment, should be retroactively applied to an audit of Title I funds expended in the 1970-71 and 1971-72 school years, is similarly lacking in merit and persuasiveness. The Third Circuit correctly applied the general rule against retroactive application of statutory enactments. Retroactive application is especially inappropriate because manifest injustice to the sovereign State will result if this Court allows the Department to rewrite the contract entered into between the Federal Government and the State according to the unilateral desires of the Department.

Should this Court reverse the decision below, and retroactively apply the sanction of repayment included in the 1978 Amendments, the substantive issues raised by New Jersey below, but not reached by the Third Circuit, must be resolved before New Jersey is directed to repay any moneys. Since these substantive issues were never addressed by the Court below, it would be consonant with the practice of this Court to remand those issues to the Third Circuit for adjudication. Since this remand would only be required if retroactive application is given to the sanction of repayment included in the 1978 Amendments, the remand should be accompanied by instructions to the Third Circuit that those aspects of the 1978 Amendments which impact on Title I eligibility should also be given retroactive effect. To do less, to impose upon New Jersey the additional burdens contained in the 1978 Amendments while, at the same time, denying the State its benefits, would be doubly unfair.

## POINT I

**Absent any express authorization in Title I for the sanction of requiring a state to repay funds allegedly misspent, it is wholly inappropriate to imply such a power over the sovereign states in the context of legislation enacted pursuant to the spending power.**

At issue is the authority of the United States Department of Education to administratively order the State of New Jersey to repay funds received in the 1970-71 and 1971-72 school years under Title I of the Elementary and Secondary Education Act of 1965 (Title I). See 20 U.S.C. § 241a *et seq.* (1974).[10] The funds were allegedly not spent

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[10] In its brief on the merits, the Department presents, for the first time, the question of whether the Department of Education may collect by administrative offset amounts allegedly due from grant-in-aid recipients. However, an examination of the record reveals that this question was not raised before the Third Circuit and was not set forth in its Petition for a Writ of Certiorari. In fact, New Jersey does not dispute the Department's statutory authority to utilize the offset procedure. More accurately, New Jersey's challenge is to the Department's power to demand a repayment of Title I moneys already spent by a local school district in New Jersey. The Third Circuit opinion acknowledges that the procedure of withholding funds was within the "clear and unambiguous terms of the statute in effect when the deposited funds were received." *State of New Jersey, Dept. of Educ.* v. *Hufstedler,* 662 F.2d 208, 211 (3d Cir. 1981) (Pet. App. 7a). But the Department chose not to pursue that remedy and now implies that the Third Circuit found it lacked authority to do so, when no such issue was ever presented to the Court.

Pursuant to Rule 21(1)(a), only the questions set forth in the petition for a writ of certiorari or fairly included therein will be considered by the Court. See also, *General Talk. Pictures*

*(Footnote continued on following page)*

in accordance with the provisions of Title I. New Jersey has maintained throughout this controversy that the Department had available only one sanction for failure to comply with the statute's provisions, namely the sole sanction expressed in the statutory scheme itself. That sanction is the power to withhold future payments of Title I funds.

Effective at the time the Final Audit Determination letter issued in this matter was 20 U.S.C. § 241j which provided:

> Whenever the Commissioner, after reasonable notice and opportunity for hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 241e(c) or 241f(b) of this title, the Commissioner

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*(Footnote continued from preceding page)*

*Corp.* v. *Western Electric Co.*, 304 U.S. 175, 179 (1938); *Mayor* v. *Educational Equality League*, 415 U.S. 605, 623 (1974); *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954). An issue must have been before the lower court for it to be considered by the Supreme Court. *Tyrrell* v. *District of Columbia*, 243 U.S. 1, 4 (1916); *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1957). This Court limits its consideration to those issues set forth in the "Questions Presented" in the petition for a writ of certiorari and has specifically disapproved of "the practice of smuggling additional questions into a case" after certiorari is granted. *Irvine* v. *California*, 347 U.S. 128, 129 (1954).

This well-established practice should be followed with regard to the additional issue concerning the power to use administrative offset which is raised by the Department at this stage of the proceeding. Disregard of this issue is even more compelling because New Jersey does not dispute the Department's authority to use the offset mechanism. Indeed, if use of the offset method is acceptable to the Department, there is no meaningful controversy between the parties other than the question of whether the funds were actually misspent—an issue presented before the Third Circuit but not reached in its decision.

> shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall not make further payments under this subchapter to specified local educational agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State under this subchapter, or payments by the State educational agency under this subchapter shall be limited to local educational agencies not affected by the failure, as the case may be.[11]

The Department does not, and cannot, point to any express authorization in the Title I statutory scheme in effect during the audited period establishing the existence of alternative sanctions. Indeed, the Department does not dispute that there was no express statutory authorization for requiring repayment of allegedly misspent Title I funds during the audited period. Rather, the Department contends that such power was implied and, as proof of *sub silentio* congressional intention, relies upon subsequent amendments to Title I and legislative history surrounding those amendments. New Jersey submits that the Department's reliance upon implied conditions in the Title I scheme is totally misplaced.

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[11] Similarly, the more general provisions of the education statutes governing the operation and administration of education programs, 20 U.S.C. § 1230 *et seq.* (1974), also provided the Commissioner of Education with but one remedy for program violations, that being the prospective withholding of funds. 20 U.S.C. § 1232(c) (1974).

**A. To allow the Department to require New Jersey to pay back moneys expended in the Newark School District during the 1970-71 and 1971-72 school years by retroactive application of the sanction of repayment, first included in the 1978 Amendments, offends the basic principles of federalism.**

It is beyond challenge that Congress has the power to fix the terms upon which allotments to the States shall be disbursed. See, *e.g., Oklahoma* v. *United States Civil Serv. Comm'n.*, 330 U.S. 127, 143 (1947); *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 295 (1958). However, when Congress seeks to regulate the States pursuant to the spending power, certain limits attach.[12] Crucial to the exercise of Congress' power to impose terms and conditions upon the States pursuant to the spending power is the requirement that the terms and conditions be clearly stated. See *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17-18 (1981); *Bd. of Educ., Hendrick Hudson School Dist.* v. *Rowley*, —— U.S. ——, 102 S.Ct. 3034, 3042 n.11 (1982); *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 399 (1981) (Burger, C.J., concurring). See also *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 284-285 (1973); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). See generally L. Tribe, *American Constitutional Law* §§ 5-8, 5-10 and 5-20 (1978). The reason for this requirement generates from fundamental considerations of sovereignty. As stated by this Court in *United States* v. *Bekins*, 304 U.S. 27 (1938):

> It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. * * * The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and

[12] It was stipulated below that Title I was enacted in exercise of the spending power, U.S. Const. art. I, § 8, cl. 1 (Pet. App. 13a, n.15).

> give consents where that action would not contravene the provisions of the Federal Constitution [*Id.* at 52].

Furthermore, the Court stated:

> As the States were at liberty upon obtaining the consent of Congress to make agreements with one another, we saw no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. And we added that "Nowhere in our scheme of government—in the limitations express or implied of our federal Constitution—do we find that she [the State] is prohibited from assenting to conditions that will assure a fair and just requital for benefits received" [*Id.* at 53].

See also *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 597 (1937) ("Even sovereigns may contract without derogating from their sovereignty").

This Court has recognized that "legislation enacted pursuant to the spending power is much in the nature of a contract . . ." *Pennhurst State School & Hospital* v. *Halderman, supra,* 451 U.S. at 17. In exchange for the receipt of federal funds, the States accept the terms and conditions fixed by Congress as preconditions for disbursement of the federal funds. *Ibid.* See *King* v. *Smith,* 392 U.S. 309, 333 n.34 (1968); *Oklahoma* v. *United States Civil Serv. Comm'n., supra,* 330 U.S. at 144. For the legislation to be legitimate there must be voluntary and knowing acceptance by the States of the terms of the "contract." *Pennhurst State School & Hospital* v. *Halderman, supra,* 451 U.S. at 17. See *Steward Machine Co.* v. *Davis, supra,* 301 U.S. at 585-598. Essential to voluntary and knowing acceptance by a State is legislative clarity in the terms and conditions Congress seeks to impose in exchange for the receipt of federal funds. As this Court stated in *Pennhurst*:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation [451 U.S. at 17 (citations omitted)].

See also *Bd. of Educ., Hendrick Hudson School Dist.* v. *Rowley, supra,* —— U.S. at ——, 102 S.Ct. at 3042 n.11; *Univ. of Texas* v. *Camenisch, supra,* 451 U.S. at 399 (Burger, C.J., concurring).

Among the most significant concerns which a State must consider upon entering into a "contract" with the Federal Government are the consequences which flow from participation. Especially in the situation of an innovative, untested federal program, a State would undoubtedly be concerned with possible sanctions which might be inflicted upon it should errors occur in the implementation of the program in its early years. This is particularly true in the Title I program where initial responsibility for designing and implementing the program rests not with the State but with the local school districts. The Title I statutory scheme, in place during the 1970-71 and 1971-72 school years, provided one sanction should a State be found out of compliance with the program's requirements. That sanction was prospective only. It required the Commissioner of Education to withhold future payments from a State, or to require the State to withhold future payments from a specific local education agency, if he finds that there has been "a failure to comply *substantially* with any assurance set forth in the application of that State . . ." 20 U.S.C. § 241j (1974) (emphasis added). The

reason for the prospective nature of this single sanction authorized by Congress during the early years of Title I is readily discernible. At the time in question, Title I represented an ambitious and somewhat unusual "federal foray" into the educational domain; it operated under a set of rules and regulations that were untested, unclear and confusing.[13] Sound policy reasons support the Congressional determination to provide a remedy which would not severely penalize the States, or the children for whose benefit the program was designed, for violations of regulatory requirements which might occur despite good faith efforts to correctly implement the program. The prospective nature of the sanction imposed during the early years of Title I assured that the States would bring their programs into compliance if they wished to continue receiving federal funds and that the Federal Government would be made whole for funds allegedly misspent while, at the same time, not interfering with the internal fiscal affairs of the individual states.

Similar considerations underlie this Court's decision in *Rosado* v. *Wyman*, 397 U.S. 397 (1970). In *Rosado*, this Court reviewed the compatibility of New York's Social Services Law with § 402 of the Social Security Act as amended. Under scrutiny was an Aid to Families with Dependent Children (AFDC) program. As in the Title I scheme, a State desirous of obtaining federal funds for AF DC programs is required to submit a plan to the federal

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[13] The legislative history of the 1978 Amendments to Title I acknowledges that the prior version of the law needed simplifying and clarifying and that local school districts had often been subjected to disparate treatment because of the unclear nature of the law. H.R. Rep. No. 1137, 95th Cong., 2d Sess. 41-56, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5011-5026.

agency charged with responsibility for administering the grant scheme, here the Department of Health, Education and Welfare (HEW). *Id.* at 406 n.8. The Secretary of HEW must afford a State notice and opportunity for a hearing on any alleged noncompliance with federal requirements. *Ibid.* If after notice and hearing the State is determined to be not in compliance with federal requirements, the Secretary is directed by statute, 42 U.S.C. § 604a (1964 ed. Supp. IV), "to make a total or partial cutoff of federal funds to the State." *Ibid.* In *Rosado,* New York's program was found to be incompatible with § 402a(23) of the Social Security Act and the Court determined that petitioners were entitled to injunctive relief against other payments of federal funds should the State not develop a conforming plan within a reasonable period of time. *Id.* at 420. The Court, however, was sensitive to the massive cost to the State of New York to bring its program into compliance. *Id.* at 421. Accordingly, the relief ordered by this Court was to remand the matter to the District Court for the fixing of a date by which the State was to revise its program, should it so wish, so as to be in compliance with federal law. If New York chose not to submit a revised program by that date, then the District Court was to restrain the further use of federal funds under the statute in issue. *Ibid.*

Thus, in *Rosado,* this Court curtailed the use of a corresponding prospective sanction in a federal funding scheme because of the significant impact to the State's finances threatened by immediate withholding of future payments. In this matter, New Jersey does not even seek the somewhat drastic fashioning of relief authorized by this Court for the State of New York in *Rosado.* New Jersey seeks merely to have this Court find, as did the Third Circuit, that the Department's remedies in administering the Title I program are limited to those sanctions specifically set forth in the Title I statute at the time the State volun-

tarily entered into the federal funding program. To imply the existence of a further and much harsher sanction, that of requiring a sovereign State to make a repayment of moneys representing a refund of Title I funds which admittedly were spent on appropriate supplemental educational programs but which were allegedly spent in a manner not strictly in conformance with Title I requirements, would be inappropriate.[14]

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[14] The Department appears to claim that New Jersey knew of the existence of the sanction of repayment at the time it entered into the 1970-71 and 1971-72 grant agreements (Pet. B. 40). As proof of this knowledge, the Department points to a list, submitted by Senator Schmitt, which was printed in the Congressional Record (127 Cong. Rec. S5429 (daily ed. May 21, 1981)). The list purports to identify those States which "have paid back Title I claims— *prior to 1978* based upon violations found in using funds." The listing includes two entries for New Jersey, the first for $1,306 and the second for $4,000. Unfortunately, the listing is inaccurate as far as the New Jersey entries are concerned. The $4,000 represented not a pay back based on "violations found" but rather a settlement of a $9,805 audit claim which was finalized on February 23, 1981. Interestingly, the attorneys representing the State and the United States Department of Education in that settlement were the same attorneys involved in the Newark Title I appeal which was then pending before the Third Circuit. It was clearly understood that the Camden Title I settlement in no way compromised the State's position in the Newark matter. The $1,306 entry is even more problematic. The State's records disclose no such repayment. However, since the amounts listed are "approximations", it is fair to assume that this amount represents the portion of the Newark audit exception for the 1970-71 school year which was not barred by operation of the statute of limitations: $1,674 (Pet. App. 57a). This amount, involved in the present controversy, has clearly not been repaid to the Department. These two faulty entries in the May 21, 1981 Congressional Record constitute a very unstable foundation from which to construct the argument that the State of New Jersey knowingly entered into grant agreements in 1970 and 1971 which agreements included a repayment sanction.

Where Congress has clearly established an express remedy in the Title I scheme, this Court should be reluctant to find implied therein additional and greater remedies to be used against the States. See *Pollard* v. *Bailey*, 87 U.S. 520, 527 (1874) ("A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone must be employed."). See also *Middlesex Cty. Sewerage Auth.* v. *Sea Clammers*, 453 U.S. 1, 20 (1981) (The existence of sufficiently comprehensive remedial devices provided in a congressional enactment may suffice to demonstrate an intention to preclude permitting additional remedies, such as suits under 42 U.S.C. § 1983); *Nat. R. Passenger Corp.* v. *Passenger Ass'n.*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy . . . , courts should not expand the coverage of the statute to subsume other remedies").

Indeed, where the legislation is in the nature of a contract between the Federal Government and the States wherein the parties have every right to rely upon the exclusiveness of the terms and conditions of the agreement as memorialized in the legislation, this Court should be especially hesitant to retroactively modify that agreement so as to accord with the wishes of one of the parties. The approach to statutory construction which should be taken is one which reinforces the checks of pluralism and federalism. L. Tribe, *American Constitutional Law*, *supra*, §§ 5-8, 5-20. The requirement that a clear statement of congressional will manifest an exercise of congressional power is an important complement to the political check of congressional power. *Ibid.* Moreover, it is essential to maintaining the knowledgeable and voluntary nature of a State's decision to lay aside certain aspects of its sovereignty in order to contract and thus reap the benefits attendant to that contract.

Tenth Amendment considerations must perforce come into play in the analysis of this matter. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

The Constitution contemplates "an indestructible Union, composed of indestructible states" wherein both the state and national governments retain a "separate and independent existence". *Texas* v. *White*, 7 Wall. 700, 725 (1869); *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869). Federal legislation which might affect the economic independence of the States cannot be construed without regard to the implications to an individual system of government. *Kirschbaum* v. *Walling*, 316 U.S. 517, 520 (1942). The cases consistently reveal a process of "accomodation as between assertions of new federal authority and historic functions of the individual states". *Ibid.*

Adhering to the principles of federalism, the Court has repeatedly recognized that the Tenth Amendment restrains congressional action that would impair "a State's ability to function as a State." *United Transp. Union* v. *Long Island R. Co.*, —— U.S. ——, ——, 102 S.Ct. 1349, 1354 (1982); *Hodel* v. *Virginia Surface Min. & Recl. Ass'n.*, 452 U.S. 264 (1981); *National League of Cities* v. *Usery*, 426 U.S. 833, 842-852 (1976).

In *National League of Cities* v. *Usery, supra*, the Court considered a challenge to the 1974 Amendments to the Fair Labor Standard Act which had applied federal minimum wage and maximum hour regulations to most employees of state and local government. The issue under review was whether that congressional action encountered a Tenth Amendment impediment because the regulations applied directly to the states and subdivisions of states as employers.

*Id.* at 847. The Court commenced its analysis by making a clear distinction between congressional regulation of private entities "necessarily subject to the dual sovereignty of the government of the nation and of the State in which they reside" *Id.* at 545, and federal regulation "directed, not to private citizens, but to the States as States." *Ibid.* As to the private entities, the Court found no Tenth Amendment barrier to Congressional action. *Id.* at 840. However, the Court held that "the States as States stand on quite a different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce." *Id.* at 854. When there is a direct attempt by Congress to regulate the States as States, it must be recognized that "there are attributes of sovereignty attaching to every State government which may not be impaired by Congress, not because Congress may lack an affirmative grant of Legislative authority to reach the matter, but because the Constitution prohibits it from exercising authority in that manner." *Id.* at 845. It was found that the regulations in issue would impair the State's authority "to structure integral operations in areas of traditional government functions." *Id.* at 852. Therefore, pursuant to the Tenth Amendment Congress could not "abrogate the State's otherwise plenary authority" to make these decisions. *Id.* at 846.

This Court has recently identified three separate inquiries underlying the result in *National League of Cities* v. *Usery*. A congressional action is violative of the Tenth Amendment if it regulates the "States as States," if it addresses matters that are indisputably "attributes of state sovereignty" and if it directly impairs the State's ability "to structure integral operations in areas of traditional governmental functions." *Hodel* v. *Virginia Surface Min. & Recl. Ass'n, supra,* 452 U.S. at 287-288 (quoting, *National League of Cities* v. *Usery, supra,* 462 U S. at 854,

845, 852). In the matter now before this Court, a vital area of a State's sovereignty would be affected should the Department's reading of the pre-1978 Title I scheme prevail. If ordered to repay Title I funds to the Department, which funds admittedly were expended to provide appropriate supplemental educational programs for disadvantaged children, New Jersey would be faced with several unpalatable options by which it could comply with this federal order.[15] The first would be to seek a supplemental appro-

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[15] These consequences were fully understood by the Department. At oral argument before the Title I Audit Hearing Board, Counsel for the Deputy Commissioner contended:

> . . . by demanding a refund, we are not diminishing the responsibility of SEA [New Jersey] and LEA [Newark] to maintain current programs that provide equal fair shares of those services to Title I recipients. *They* [*New Jersey*] *will have to find the money to pay us back out of some other place, some other program, some other appropriation.*
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> * * *
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> *It might well come from a special appropriation to pay a debt to the United States and it need not come out of any currently operated program.* (Emphasis added) (Pa575 to Pa576; Vol. IV of Appendix submitted on behalf of Petitioner, State of New Jersey, in the Third Circuit).

Furthermore, although the Department asserts, in its brief, that no efforts were undertaken to establish the "method of repayment" by New Jersey following the May 7, 1980 Final Determination, this assertion simply ignores the facts of this case (Pet. B. 21; Pet. B. 11 n.19). By letter dated May 23, 1980, the New Jersey Commissioner of Education was informed that "your check in the amount of $1,031,304 must be sent immediately" to the Financial Management Division of the United States Department of Education. Further, if the Commissioner's check did not reach that office within 30 days, he was informed that "interest will be assessed at a rate of ¼ of 1%, or $7,734.78 for each thirty days or fraction thereof, beginning thirty days from the date of this letter" (R.N.J. App. 1a).

priation which, if enacted, could force a reduction in other essential services supported by State funding. Another method of repayment, no less onerous, would be to deduct the money owed the Department from the State aid account for public education in New Jersey. Since there would be no basis to reduce the State aid distributed to other school districts, this reduction would have to be made from that designated for the Newark school district. The exercise of this particular option might well have a devastating impact on the Newark educational system which, of all the districts in New Jersey, relies most heavily on State Aid to fund a "thorough and efficient" system of public education as required by the Education Clause of the New Jersey Constitution. N.J. Const., art. VIII, § IV, par. 1. Indeed, any reduction in the State Aid provided this district could render it incapable of maintaining a constitutionally sufficient educational system. See *Robinson* v. *Cahill*, 69 N.J. 448, 467, 355 A.2d 129, 139 (1976); Public School Education Act of 1975, c. 212, P.L. 1975, N.J.S.A. 18A:7A-1 *et seq.* An equally disruptive alternative by which New Jersey could repay the $1,031,304 would be the deduction of that amount from the operational account of the New Jersey Department of Education. Since the entire departmental operating budget for fiscal year 1983 was $32,791,147, a reduction of this magnitude would seriously impede the State's ability to provide essential support services to school districts throughout the State and would hamper the State's ability to assure the quality of the statewide system of public education. See, General Appropriations Act, c. 49, P.L. 1982, eff. June 30, 1982. This drastic reduction of educational services at the State level would similarly raise serious questions as to the State's ability to discharge its responsibilities under the "thorough and efficient" Education Clause of the New Jersey Constitution.

Furthermore, this Court has recognized the uniquely State and local nature of the responsibility for public education. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Brown* v. *Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).[16] The repayment sanction would, therefore, not only invade the State appropriations process but would undercut the ability of the State, within the context of available appropriations, to fiscally sustain a "thorough and efficient" statewide system of public education. A much less intrusive sanction, one extant under Title I during the period of the Newark audit, was the prospective withholding of Title I grant moneys. If the Department were to withhold future grant moneys, to the extent of any moneys

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[16] Indeed, even the legislative history of the 1978 Amendments reiterates the concern that control of educational decision-making remain with the States and local governmental agencies.

> It must always be remembered that education is primarily the responsibility of States. The Congress has enacted measures to stimulate and encourage the development of programs to improve achievement of students in targeted areas of particular national concern. And States are authorized and encouraged to organize, coordinate, and supervise State and Federal programs within the State in any way that will best carry out the intent of these statutes enacted by Congress. But, nothing in any of these statutes should be construed to discourage coordination of State and Federal programs [H.R. Rep. No. 1137, 95th Cong., 2d Sess. 142, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 5112].

See *Wheeler* v. *Barrera*, 417 U.S. 402, 416-417 (1974).

found to be "misspent" or "misapplied"[17] the Federal Government would be made whole. Disadvantaged children, the intended beneficiaries of Title I programs, would not be harmed, since the State would be required to maintain a certain level of funding in accordance with Title I requirements. However, the State would be permitted the discretion to adjust its expenditures prospectively to meet that federal shortfall and, as importantly, provided the time to plan wisely. Most significantly, under the withholding sanction, the State would not be ordered to make an appropriation—a State legislative decision which is fundamental to the concept of sovereignty.

The Department, however, refused to exercise the less obtrusive sanction of withholding and attempted to force the State to appropriate moneys to satisfy an alleged debt owed to it. The Department is, therefore, endeavoring to regulate the "States as States." The command is addressed to an arm of State Government in its capacity as a governmental entity. As the Court has recently recognized "having the power to make decisions and to

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[17] The Department's brief is replete with references to the moneys "misspent" or "squandered" by the State and suggests that the State was "unjustly enriched" by these Title I moneys (Pet. B. 6 n.11; Pet. B. 32; Pet. B. 41). The State, however, has never conceded the correctness of the underlying audit determinations but has vigorously pursued its substantive challenges to these findings within the administrative proceeding and before the Third Circuit. The Court below declined to reach these substantive issues since it concluded that the Secretary of Education was without authority to order New Jersey to repay Title I moneys expended during the 1970-71 and 1971-72 school years. There has, therefore, been no adjudication that Title I moneys were "misspent" or "misapplied" in the Newark Title I program for those years. In fact, should it become necessary to address these issues, the State remains confident that it will prevail on the merits, as well it should, given the admittedly pervasive disadvantaged status of the Newark populous.

set policy is what gives the State its sovereign nature." *Federal Energy Regulatory Comm'n* v. *Mississippi*, —— U.S. ——, ——, 102 S.Ct. 2126, 2138 (1982).

The management of the State budget is clearly an essential and traditional governmental function and since the sanction of repayment was not considered when the State grantees entered the program, the State was deprived of the opportunity to decide whether to participate and was also precluded from structuring the budget in such a way as to allow for the payment of these funds. If the Department were permitted to collect from the limited resources of the State and thereby reduce its ability to attend to the numerous educational problems in the State, the State would be impeded from discharging its essential governmental functions efficiently and effectively.

In a situation closely analagous to the present controversy, the Second Circuit, in *New York State Ass'n. for Retarded Children* v. *Carey*, 631 F.2d 162 (2d Cir. 1980), analyzed the power of a federal court to interfere with an appropriation decision of a State legislature. In that case, a consent decree was entered into whereby Governor Carey agreed to make specific requests to the State Legislature for a review panel to improve conditions for the mentally retarded residents of a state institution. The State Legislature refused to provide the necessary funds for the panel. *Id.* at 163. The Second Circuit reversed a district court order holding Carey in contempt and stated:

> . . .[A] federal district court ought not to put itself "in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money, . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters." In the face of constitutional viola-

> tions at a state institution, a federal court can order the state either to take the steps necessary to rectify the violations or to close the institution. But that remedy leaves the question of the expenditure of state funds in the hands of the citizens of the state, not in the hands of federal judges [*Id.* at 165 (citations omitted)].

At a minimum, States must be permitted to knowledgeably agree to limit their discretion regarding internal fiscal economy and the provision of uniquely State services. That ability would be denied to New Jersey if the Department were permitted to impose a repayment sanction when the statute in place at the time the present grant agreements were entered into contained no such sanction. All New Jersey seeks is to strike a balance between competing federal and state interests. That balance is fairly struck by holding the Department to the single express remedy included in the Title I statutory scheme—the withholding of future payments of Title I moneys.

The Department obfuscates these important considerations by oblique references to the Federal Government's "inherent right" to recoup funds "erroneously or illegally paid out" (Pet. B. 15 to Pet. B. 17). However, none of the cases relied upon by the Department is instructive on the issue herein: whether the Department can order New Jersey to repay Title I moneys allegedly expended in a manner inconsistent with Title I requirements. Blind reliance on the concept of a right to "recoup" misspent grant moneys is meaningless here. The right to be made whole—if moneys, in fact, are shown to have been misspent—is not at issue; rather it is the manner of recoupment that is the heart of this controversy. New Jersey contends that it is inappropriate for the Department to demand repayment of Title I moneys without express and unambiguous language

in the congressional enactment of Title I, during the audited period, conferring that right upon the Department. The right of prospective withholding of funds, that is a setoff against future Title I funds, is specifically established and is not disputed. Nevertheless, the Department persists in confounding the controversy by posturing this appeal as if this nonissue were in fact the seminal issue.

The cases cited by the Department say no more than that the Federal Government has the right to setoff, generally available to creditors, enabling it "to apply the unappropriated moneys of the debtor, in his hands, in extinguishment of the debts due to him." *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239 (1947). Cases supporting the proposition are legion. See, *e.g.*, *Grand Tru k Western R. Co.* v. *United States*, 252 U.S. 112, 121 (1920); *Wisconsin Central R. Co.* v. *United States*, 164 U.S. 190, 211 (1896); *United States* v. *Carr*, 132 U.S. 644, 650-651 (1890); *United States* v. *Burchard*, 125 U.S. 176, 180 (1888); *McKnight* v. *United States*, 98 U.S. 185, 186 (1879); *Gratiot* v. *United States*, 15 Pet. 336, 370 (1841). Most importantly, these cases cited by the Department do not support the alleged right to demand repayment.

The only cases cited by the Department which are relevant to the issue of repayment undermine its contention that it has the right to demand repayment within the context of an administrative proceeding. In *United States* v. *Wurts*, 303 U.S. 414 (1938) and *United States* v. *Bank of Metropolis*, 15 Pet. 377 (1841), this Court recognized that the Federal Government may sue before a court of competent jurisdiction to recover funds wrongfully or erroneously paid; it emphasized, however, the need for a court to pass upon the government's claim. No such judicial proceeding has been initiated by the Department in the present matter. Furthermore, the statements in *Wurts*, suggestive of

a right to recoup an erroneous tax refund by suit to compel repayment, are merely *dicta*. The issue in that case focused upon the commencement of a limitations period for the Federal Goverment to recover an erroneous tax refund. Moreover, *Wurts* did not involve an attempt to obtain repayment from a sovereign State in the context of a grant agreement which, at the time entered into, provided the State with no notice that the sanction of repayment was available to the Federal Government. Indeed, none of the cases cited by the Department to support its claimed power to order New Jersey to repay Title I moneys within the context of an administrative proceeding, involved a sovereign State. Rather, they involved private individuals, *United States* v. *Burchard, supra; Gratiot* v. *United States, supra; McKnight* v. *United States, supra,* or commercial enterprises or entities, *Grand Trunk Western R. Co.* v. *United States, supra; Wisconsin Central R. Co.* v. *United States, supra; United States* v. *Bank of Metropolis, supra.* This critical difference precludes the Department from utilizing these cases to support its purported authority to order the State of New Jersey to repay $1,031,304 in Title I moneys, particularly when that order issues not from a court of competent jurisdiction but from an administrative tribunal.

The Department's reliance upon *Mount Sinai Hospital of Greater Miami, Inc.* v. *Weinberger,* 517 F.2d 329 (5th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976) is similarly misplaced. In the first instance, *Mount Sinai* simply stands for the proposition that the Federal Government may seek to recoup Medicare payments improperly spent by non-governmental entities by means of offset or may pursue, in the courts, an action to require repayment of said funds. See *United States* v. *Bank of Metropolis, supra; United States* v. *Wurts, supra.* Secondly, and more importantly for this matter, *Mount Sinai* provides

no guidance on the proper balance between the Federal Government and the States regarding sanctions which may be legitimately imposed upon the States in the context of a grant agreement. The same failure to address federal-state considerations requires rejection of lower court decisions cited by the Department together with *Mount Sinai* (Pet. B. 17, n.20). *Cf. West Virginia* v. *Secretary of Educ.* 667 F.2d 417 (4th Cir. 1981) (Considerations of federal-state relations and legitimate exercises of power over sovereign States apparently not raised and not considered by Fourth Circuit in reaching its decision).

Indeed, the decision in *California* v. *Block,* 663 F.2d 855 (9th Cir. 1981) is much more responsive to the issues presently before this Court. In that case, the Federal Government, absent express statutory authority, sought to impose the sanction of repayment against the sovereign State of California. The Ninth Circuit recognized that for a sanction to be utilized against a State, that sanction must voluntarily and knowingly be accepted by the State as part of its acceptance of the "contract" entered into with the Federal Government pursuant to an exercise of the spending power. *Id.* at 858-859, n.3. In *Block,* as in the instant matter, the Federal Government attempted to impose sanctions against a State which were inconsistent with the statutory scheme enacted pursuant to the spending power and accepted by the State at the time it agreed to participate in the grant-in-aid program. The Federal Government's attempt to alter the federal-state agreement was rebuffed by the Ninth Circuit and the Department's similar attempt herein should also be rejected.

**B. To allow the Department to require New Jersey to pay back moneys expended in the Newark school district during the 1970-71 and 1971-72 school years by retroactive application of the sanction of repayment, first included in the 1978 Amendments, offends basic principles of statutory construction.**

During the period at issue here, two statutory sources provided for the sanctions available to the Department in the event a participating State or local school district was found to be in substantial noncompliance with the requirements of Title I. 20 U.S.C. §§ 241, 1232(c) (1974). Both provided solely for the prospective withholding of funds and contained no reference, express or implied, to repayment of amounts expended on educational programs for disadvantaged children but subsequently disallowed by audit finding. *Ibid.* Since this power to order repayment of Title I funds was not specifically made one of the terms and conditions of the grant agreement until 1978 (Pub. L. 95-1561, 92 Stat. 2190 (1978) (codified at 20 U.S.C. § 2835(b) (1982 Supp.) see also, Pub. L. 95-561, 92 Stat. 2347 (codified at 20 U.S.C. § 1234(a) (1982 Supp.)), New Jersey never had the opportunity to knowledgeably consider the ramifications of this power when it voluntarily gave its consent to participate in the Title I program in 1970 and 1971.

Nor could such a power be reasonably inferred from the statutory scheme during that period.[18] Congress had un-

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[18] The Department's reliance upon the Federal Claims Collection Act, 31 U.S.C. § 951 *et seq.* to support its claimed right to demand repayment is misplaced. By its very terms, the Act professes neither to increase nor diminish an agency head's authority to litigate claims. 31 U.S.C. § 953. Those methods are set by the terms of the statutory scheme in question, here Title I. The terms of the Federal Claims Collection Act precludes interpreting that Act as augmenting the powers conferred upon agency heads.

ambiguously presented, in 20 U.S.C. §§ 241 and 1232(c) (1974), to the Federal Government and to participating State and local governmental entities the sanctions for substantial noncompliance which were to become part of the intergovernmental agreement. There was no hint therein of an implied additional and harsher penalty of repayment. Neither is there any reasonable inference of such a power in the legislative history of the Title I statute available at the time New Jersey entered into the Title I program for the 1970-71 and 1971-72 school years.

The Department, however, has attempted to ground the existence of this sanction upon the following language in the Senate Report on Pub. L. 91-230:

> RECORDS AND AUDIT
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> The language of section 425 is based on a recommendation of the Comptroller General respecting retention of records and audits relating to education programs.
>
> Audit reports on Title I of the Elementary and Secondary Education Act have been valuable to the committee in its review of that program. The committee notes that exceptions have been taken to certain expenditures of Title I during the initial years of the program and, to the extent this committee has reviewed those exceptions, they appear to be well founded. Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer [S. Rep. No. 634, 91st Cong. 2d Sess. 58-59, *reprinted in* 1970 *U.S. Code Cong. & Ad. News* 2826-2827].

However, the Third Circuit correctly understood the reference to Section 425 under "Records and Audit" to be a typographical error, the correct reference being to Section 424 (Pet. App. 16a). The Third Circuit's reading of that portion of the legislative history is borne out by the section-by-section analysis of the amendatory legislation appearing subsequently in the legislative history which provides in pertinent part:

> Section 424. Records and audit. — This section sets forth the basic recordkeeping and audit requirements for education programs.
>
> Subsection (a) of section 424 requires that each recipient of funds from a grant or contract under any applicable program keep such records as the Commissioner shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such grant, the total cost of the project or undertaking in connection with which such grant or contract is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.
>
> Subsection (b) of section 424 provides that the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of the recipients that are pertinent to the grant or contract received under any applicable program.
>
> Section 425. Payments—This section provides that payments pursuant to grants or contracts under

> any applicable program may be made in installments, and in advance or by way of reimbursements, with necessary adjustments on account of overpayments or underpayments, as the Commissioner may determine [S. Rep. No. 634, 91st Cong., 2d Sess. 133, *reprinted in* 1970 *U.S. Code Cong. & Ad. News* 2901].

In Section 424, Congress merely intended to assure a continual flow of updated information concerning the program to the Department and to Congress. In light of the number of amendments to the statutory scheme, it is at once apparent that Congress relied upon this flow of information to make the program as effective as possible. Moreover, review of this legislative history, does not support the authority of the Department to demand repayment of any costs disallowed by audit. Indeed, if anything concerning this point can be gleaned from the above quoted legislative history, it is that adjustment due to "overpayment" is to occur by alteration of the payment schedule. See analysis of Section 425. 1970 *U.S. Code Cong. & Ad. News, supra,* 2901.

The Department seeks to circumvent this obvious flaw in its position by relying upon two separate but related arguments having as their common focus the provisions in the 1978 Amendements specifically authorizing the Department to demand repayment, from participating States and local governmental entities, on the basis of audit findings. 20 U.S.C. § 2835(b) (1982 Supp.). See also 20 U.S.C. § 1234a (1982 Supp.).

First, the Department asserts that the 1978 provisions authorizing the Department to demand repayment ought to be applied retroactively. This argument was correctly rejected below, the Third Circuit relying, in part, upon the general rule against retroactive application of statutory

enactments as discussed in this Court's rulings in *Greene* v. *United States*, 376 U.S. 149, 160 (1964) and *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190 (1913). See also *United States* v. *Richardson*, 512 F.2d 105, 106 (3d Cir. 1975).

In its brief on the merits, the Department criticizes the Third Circuit's reliance upon *Greene* contending that this Court ruled against retroactive application of a newly established regulation, in *Greene*, solely because the claimant therein already had an administratively determined right to seek lost wages when the new procedures were adopted and further, that it would be unfair to apply new, more restrictive, standards once a final determination had been made. The Department contends that since there there was no administrative determination regarding entitlement to Title I funds when the 1978 Amendments were enacted, the *Greene* rationale is wholly inapplicable to the present case. The department's analysis distorts the basis of the *Greene* decision.

The claimant in *Greene* was employed by a private corporation involved in classified work for the military. The Department of the Navy revoked this employee's security clearance without a hearing and he was discharged. *Greene* v. *United States*, 376 U.S. at 154. Claimant filed an action for injunctive relief and following a remand by this Court in *Greene* v. *McElroy*, 360 U.S. 474 (1959), the District Court entered a final order that the Secretary of Defense was unauthorized in its revocation of the security clearance. 376 U.S. at 155. Claimant then brought an administrative action for loss of earnings based upon a 1955 Department of Defense regulation. The Department refused to consider the claim under the 1955 regulation but offered to review the matter pursuant to the 1960 regulation, issued after the claim had arisen and after it

had been asserted. Under the 1960 regulation, monetary restitution was conditioned upon pursuance of certain administrative procedures. The Department of Defense argued that the 1960 regulation was applicable and that before restitution is allowed, the claimant must comply with the additional conditions at the administrative level. This Court rejected such contention, stating that:

> Whatever petitioner's rights are, there can be no doubt they matured and were asserted under the 1955 directive. Not until six months after petitioner formally presented his claim to the Department of Defense did the Secretary of Defense issue a new, and substantially revised, regulation concerning "monetary restitution". Thus, the Government's argument necessarily requires that the 1960 regulation be given retroactive application [*Id.* at 160].

The Court then articulated the long-established rule against the retroactive application of a statute and concluded that it would be "unjustifiable to give the 1960 regulation retroactive effect." *Ibid.*

After the Court ruled against the retroactive application of the 1960 regulation, it addressed the issue of whether, pursuant to the 1955 regulation, claimant was entitled to monetary relief. It was only in addressing this issue that the Court considered whether a final administrative determination had been reached. *Id.* at 160-161. Despite the Department's assertions to the contrary, (Pet. B. 38 n.49), this Court's concern, in *Greene,* with whether a final administrative determination had been made, had no bearing upon its decision to apply the rule against the retroactive application of a new regulation. See also *Claridge Apts. Co.* v. *Comm'r of Internal Revenue,* 323 U.S. 141, 164 (1944) ("Retroactivity, even where permissible, is not

favored, except upon the clearest mandate."). Retroactive application is especially inappropriate where as in *Greene* and *Claridge*, additional burdens rather than benefits are concerned. *See Claridge Apts. Co.* v. *Comm'r of Internal Revenue, supra*, 323 U.S. at 164.

Generally, a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974). The concerns relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Id.* at 717.

The legislative history of Public Law 95-561 which encompasses both provisions of the 1978 Amendments which grant power to order repayments, reflects a Congressional understanding of the need to make pre-1978 Title I requirements more understandable. H.R. Rep. No. 1137, 95th Cong., 2d Sess. 41-56, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 5011-5026. The legislative history of the 1978 Amendments underscores their purpose of augmenting the flexibility available in the operation of local programs. *Id.* at 4972. The legislative history, however, reflects no Congressional intention to mandate retroactive effect of the statutes authorizing the Commissioner to demand refunds. The impropriety of giving the refund provisions retroactive application, in such circumstances, is evident when the factors in *Bradley* are considered.

The first two factors under the *Bradley* analysis focus upon the nature of the parties involved and their rights. Here the rights of a sovereign State are at stake. As fully discussed *ante* in Subpoint A, a State, when it enters into a voluntary agreement with the Federal Government, is en-

titled to know, with precision, the terms and conditions of the agreement in order that its consent may be knowledgeable and voluntary. That right should not be eliminated by the retroactive modification of that agreement by Congress. However, in the present matter there is no evidence that Congress intended a result which would be disruptive of the balance between legitimate Federal and State interests. In this context, it is submitted that, under *Bradley*, retroactive application of the repayment sanction would be impermissible.[19]

The Department's second but related argument in this regard is that the legislative history surrounding the 1978 Amendments suggests that Congress believed the power to demand repayment of allegedly misspent Title I funds was implied in the earlier versions of Title I. However, the Department fails to appreciate that it is contrary to established law regarding exercises by Congress under the spending power for Congress to regulate the States

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[19] 20 U.S.C. § 2835(b) specifically requires the enactment of procedures by the Commissioner of Education for repayment if such a sanction is to be utilized:

> The Commissioner shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. . . . Where, *under such procedures,* the audit resolution process requires the repayment . . . (emphasis added).

The Commissioner did not adopt procedures until "interim final form" regulations were published in 44 Fed. Register 30528, May 25, 1979. The final rules and regulations were not published until April 3, 1980, and thereafter Congress disapproved them. H. Con. Res. 318, 96th Cong., 2d Sess. (1980). The Panel's determination below, therefore, was rendered pursuant to ineffective or invalid rules and regulations. Thus, it cannot be said that the process "under such procedures" required the repayment of Federal funds.

in any manner other than by clear, unambiguous and, as a necessary counterpart, express language. There is no such clear, unambiguous statement here.[20]

Furthermore, in order to find that the power to order repayment was implied in the version of Title I in effect during the audited years, the power would have to be bottomed upon the only statutory sections in effect which related to sanctions. The prospective withholding section would have to be understood as supporting such an implied power.[21] However, that position is belied by Congress' reenactment of the withholding section concurrently with the first enactment of the repayment section. Compare 20 U.S.C. § 1234b and 20 U.S.C. § 2836 with 20 U.S.C. § 1234a and 20 U.S.C. § 2835. As the Third Circuit correctly concluded, it would "not only be ascribing to Congress a useless act in enacting Section 185 [20 U.S.C. § 2835], but would be construing the Act to con-

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[20] Indeed, Congress has had no difficulty explicitly providing for such a sanction when it has desired to do so. See 20 U.S.C. § 646(d) (1974 Supp.); 20 U.S.C. § 954(h) (1974 Supp.). See also 20 U.S.C. § 241-1(c) (1974 Supp.). For an instructive listing of examples where Congress has seen fit to expressly authorize a repayment sanction, see 2 R. Cappalli, *Federal Grants and Cooperative Agreements*, § 8.14 (1982).

[21] Such power could not be implied under 20 U.S.C. § 884, which was enacted in 1974, because this section does not constitute a grant of power but rather a limitation of power. Indeed, 20 U.S.C. § 884 does not address the method of recovery. It merely limits the period for which recovery may be had and must be read *in pari materia* with the two existent provisions delineating the method of recovery which was by prospective withholding. 20 U.S.C. §§ 241, 1232(d). Nor does the legislative history to 20 U.S.C. § 884 indicate the manner by which the Department may "collect" on an audit exception (Pet. B. 34 n.44). H.R. Rep. No. 805, 93d Cong., 2d Sess. 67-68, *reprinted in* 1974 U.S. Code *Cong. & Ad. News* 4160-4161.

tain plain redundancies" (Pet. App. 18a). Such conclusion is, of course, untenable. This Court is urged to similarly reject this theory of implied power to order repayment.

For all of the foregoing reasons, New Jersey respectfully submits that there is no statutory basis, express or implied, for the Department's assertion of a right to demand repayment of Title I moneys expended in the Newark school district during the 1970-71 and 1971-72 school years.

## POINT II

**Should the decision below be reversed and the sanction of repayment, first included in the 1978 Amendments, be retroactively applied, this matter should be remanded for an adjudication of those substantive issues raised below but never reached by the Third Circuit with instructions that all sections of the 1978 Amendments be given retroactive effect.**

Throughout the pendency of the administrative proceeding, initially before the Title I Audit Appeal Board and later the Education Appeal Board, New Jersey advanced its substantive arguments challenging the Final Audit Determination of the Newark Title I program for the 1970-71 and 1971-72 school years. New Jersey contended that the attendance areas disallowed for funding by the federal auditors were, in fact, eligible for Title I funding; in the alternative, the State argued that the entire Newark school district qualified for designation as a Title I area. These substantive arguments, rejected by the Department of Education in its final decision, were raised before the Third Circuit. In its decision, the Third Circuit found it unnecessary to reach these

issues since it concluded that the Department did not have the authority to issue an order directing New Jersey to repay allegedly misspent Title I moneys (Pet. App. 3a).

Should this Court conclude that the Department was statutorily authorized to order the repayment of Title I funds expended in the 1970-71 and 1971-72 school years, the substantive issues advanced by New Jersey must be resolved before New Jersey is directed to repay any moneys. Where this Court does not have the opinion of the lower court on a particular legal issue, it generally declines to consider that issue remanding it to the court below for resolution. *Middlesex Cty. Ethics Comm.* v. *Garden State Bar Ass'n*, —— U.S. ——, ——, 73 L.Ed.2d 116, 128 n.17 (1982); *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975). This is especially so where the resolution of those issues will require the Court to consider *de novo* complex factual presentations. In the present matter, the unresolved issues involving the correctness of the underlying audit determinations should be remanded to the Third Circuit for adjudication.

Of course, the remand of these substantive issues would only be required if this Court retroactively applies the sanction of repayment of Title I moneys, included for the first time in the 1978 Amendments, to Title I moneys expended in the Newark school district during the 1970-71 and 1971-72 school years. In the event that this sanction is so applied, those aspects of the 1978 Amendments which would impact upon the eligibility of attendance areas should, in fairness, also be given retroactive effect.

In this case, those provisions include Section 101(a) of Pub. L. 95-561, 92 Stat. 2161, which sets forth the qualifications for Title I eligiblity for a school attendance area:

> A local education agency may designate any school attendance area in which at least *25%* of the children are from low-income families as an eligible school attendance area . . . [20 U.S.C. § 2732(a)(1) (emphasis added)].

The purpose of including this low-income percentage which qualifies a school attendance area for Title I funding without reference to the district-wide level of poverty, was to eliminate an anomaly in the then existing statute, its implementing regulations and departmental practices. Indeed, this provision stemmed from the concern, expressed in the House Report, that an:

> . . . inflexible targeting requirement could force *some school districts with very high incidence of poverty to declare schools with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income or less might be eligible in wealthier neighboring districts* [H.R. Rep. No. 1137, 95th Cong., 2d Sess. 22, *reprinted in* 1978 *U.S. Code Cong. & Ad. News,* 4992 (emphasis added)].[22]

It was precisely this situation which prevailed in Newark during the period of the Title I audit. For the 1971-72 school year, Newark had a district-wide percentage of children from low-income families of *33.9%*.[23] Pursuant to the

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[22] See the Joint Explanatory Statement of the Committe of Conference indicating that by Senate amendment, the minimum percentage was raised to 25% and it is that minimum which was enacted in Section 101(a) of Pub. L. 95-561. H.R. Conf. Rep. No. 1753, 95th Cong., 2d Sess. 255, *reprinted in* 1978 *U.S. Code Cong. & Ad. News* 5158.

[23] The Title I applications submitted by the Board of Education for the City of Newark for the years following the federal audit show that the district-wide percentage of children from low-income families has ranged from 41% to 61%.

federal auditors' recalculations, ten school attendance areas in Newark were declared ineligible for Title I funding even though these areas had low-income percentages ranging from 27.9% to 33.5%. Even assuming the appropriateness of these recalculations, which New Jersey does not, it is clear that the only basis for disqualifying these attendance areas is their location within Newark, a school district with extraordinarily high incidences of poverty. Had these ten attendance areas been located within almost any other school district in the nation, they would have qualified for Title I funding. It was to correct this inequity, exacerbated by the Department's harsh construction of its implementing regulations, that 20 U.S.C. § 2732(a)(1) was enacted.[24] Should this Court, therefore, determine to retroactively apply the sanction of repayment of Title I funds, it should similarly give retroactive effect to the less stringent standards of Title I eligiblity contained in the 1978 Amendments. To do less, would impose upon New Jersey the additional burdens contained in the 1978 Amendments while, at the same time, denying the State its benefits.

In sum, should the decision of the Third Circuit, finding the Department without authority to order the State of New Jersey to repay Title I moneys expended in the 1970-71 and 1971-72 school years, be reversed, then it is

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[24] This inequity was compounded by the Department's refusal to designate the entire Newark school district as a Title I area. Ironically, Newark was found to be ineligible for district-wide designation, by the Department, because of its high incidence of poverty which pervaded it in its entirety, not because there were pockets of wealth. Since certain school attendence areas in Newark had percentages of low-income children as high as 80%, while one area was 10% — hardly a wealthy area — the Department concluded that such "wide variances" in concentrations of poverty rendered it ineligible for district-wide designation as a Title I area.

respectfully submitted that this matter should be remanded for an adjudication of those substantive issues raised below but not reached by the Third Circuit. It is further requested that a remand be accompanied by instructions that the Third Circuit, in adjudicating these substantive issues, give retroactive effect to all sections of the 1978 Amendments to the Elementary and Secondary Education Act.

## CONCLUSION

**For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit, concluding that the Secretary of Education is without authority to order the State of New Jersey to repay Title I moneys received under federal grants in 1970 and 1971, should be affirmed. Should the decision below be reversed, this matter should be remanded, with appropriate instructions, to the Third Circuit for an adjudication of those substantive issues which, although advanced by the State of New Jersey in its Petition for Review, were not reached by the Court below.**

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
*Attorney for Respondent, State of New Jersey, Department of Education*
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8577

Dated: February 14, 1983

# APPENDIX

## Correspondence Concerning Repayment of Title I Funds by State of New Jersey to United States Department of Education

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of Education
Washington, D.C. 20202

May 23, 1980

Honorable Fred G. Burke
Commissioner of Education
State Department of Education
Trenton, New Jersey 08625

Dear Commissioner Burke:

Reference is made to the U.S. Department of Education Audit Number 02-50006 and the letter of May 7, 1980, from the U.S. Department of Education Appeal Board. The decision of the Education Appeal Board is final, therefore your check in the amount of $1,031,304.00 must be sent immediately to:

U.S. Department of Education
Financial Management Division
Accounts Receivable Section Room 3085
400 Maryland Avenue, S.W.
Washington, D.C. 20202

If your check does not reach this office within thirty days, interest will be assessed at a rate of ¾ of 1%, or $7,734.78 for each thirty days or fraction thereof, beginning thirty days from the date of this letter.

*Correspondence Concerning Repayment of Title I Funds by State of New Jersey to United States Department of Education*

If additional information is desired, please contact James Sturdivant, Accounts Receivable Section, on (202) 245-8318.

Sincerely,

John A. Murphy, Chief
Fiscal Services Branch
Financial Management Division